No. 84-1484

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Supreme Court of the United States

OCTOBER TERM, 1984

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS; WISCONSIN DEPARTMENT OF ADMINISTRATION; STATE BUREAU OF PROCUREMENT; SECRETARY, WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS; DIRECTOR, STATE BUREAU OF PROCUREMENT, WISCONSIN DEPARTMENT OF ADMINISTRATION; JAN RICHARDSON; AND GARY C. SHEALY,

Appellants,

v.

GOULD INC., a Delaware Corporation,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION TO AFFIRM

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LAWS INVOLVED

Constitutional Provision

Article VI of the United States Constitution provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Statutes

1. Section 10(a) of the National Labor Relations Act, *as amended*, 29 U.S.C. § 160(a) provides in pertinent part:

> The Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise.

2. Section 10(c) of the National Labor Relations Act, *as amended*, 29 U.S.C. § 160(a) provides in pertinent part:

> If . . . the Board shall be of the opinion that any person named in the complaint has engaged or is engaging in any such unfair labor practice, then the Board . . . shall issue . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter.

3. Section 10(f) of the National Labor Relations Act, *as amended*, 29 U.S.C. § 160(a) provides in pertinent part:

> Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain review of such order in any United States court of appeals * * * Upon the filing

> of such petition, the court shall . . . have . . . jurisdiction to . . . make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. . . .

MOTION TO AFFIRM

Appellee, Gould Inc., by its attorneys, moves the Court to affirm the decision below. The question on which the cause depends is so insubstantial that it warrants no plenary hearing because:

1. The Seventh Circuit, in finding Wisconsin's Labor Law Violators List Statutes (Wis. Stats. §§ 101.245 and 16.75(8) (1981)), preempted by the National Labor Relations Act (29 U.S.C. § 151 *et seq.* ("NLRA" or the "Act")), added no new principles of law. The decision follows this Court's holding in *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959). Appellants do not contend otherwise.

The Seventh Circuit held that the Statutes, which debar employers for three years for NLRA violations, regulate conduct governed by the Act and impose an unlawful penalty. Congress has long recognized debarment as a potent method of regulating federally proscribed conduct. *See,* the Walsh-Healy Act (41 U.S.C. § 35 *et seq.*), the Bacon-Davis Act (40 U.S.C. § 276a *et seq.*), the Rehabilitation Act of 1973 (29 U.S.C. § 793), and Executive Order 11246.

But Congress considered and *rejected* debarment as a means of regulating NLRA conduct. *Proposed Labor Law Reform Bill of 1978,* S. 2467, H. 8410, 95 Cong. 2d Sess. 30 (1978), because debarment is a penalty (*see, Statement of Sen. Hatch (R. Utah)*, 124 Cong. Rec. S. 13843 (May 16, 1978)), while national labor policy is remedial. *NLRB v. Newport News Shipbuilding & Dry Dock Co.,* 308 U.S. 241 (1939).

Garmon teaches:

> [T]o allow the State to grant a remedy here which has been withheld from the National Labor Relations Board only accentuates the danger of conflict. 359 U.S. at 247.

2. Wisconsin, seeking to evade *Garmon's* teachings, now poses as a mere buyer in the market place, not as a regulator of

labor conduct. Appellants were not so modest in the district court. There they asserted:

> The state has a deeply rooted policy of discouraging labor law violations, and . . . as a market participator . . . can so restrict its purchasers so as *not to promote labor law violators* as an exception to NLRA preemption . . . Wisconsin . . . is merely seeking to *influence private conduct* already prescribed [sic] by federal labor policy. (Emphasis in original) App. 73.

The Seventh Circuit opinion punctures any "private buyer" pretense (App. 30-38).

Appellants rely on *non*-NLRA cases to support their position (Jurisdictional Statement pp. 10-17). Those cases involve the reach of the dormant Commerce Clause. However, Congress exercised its full Commerce Clause authority in enacting the NLRA. *Polish National Alliance v. NLRB,* 332 U.S. 643 (1944); *NLRB v. Fainblatt,* 306 U.S. 601 (1939). Thus, as explained by all four judges below (App. 21-22, 67 n.7), the cases relied on by appellants are patently inapplicable.

Indeed, *National League of Cities v. Usery,* 426 U.S. 833 (1976), one of the cases appellants rely upon, was expressly *overruled* this term. *Garcia v. San Antonio Metropolitan Transit Authority,* Nos. 82-1913 and 82-1951, ____ U.S. ____, 53 L.W. 4135 (February 19, 1985).

3. The Jurisdictional Statement asserts, "The Circuits are conflict." Yet, appellants confess, "No other decided case is on all fours." (Brief p. 17.) In fact no Court of Appeals has held that a state may debar, or otherwise penalize, an employer because the employer was found to have violated the NLRA.

The Seventh Circuit opinion demonstrates in detail that the claim of conflict is invalid (App. pp. 22-31). For example, in *J. P. Stevens & Co. v. Jackson,* 99 LRRM 2827 (N.D. Ga. 1978), a major case relied on by appellant to establish conflict, the issue of NLRA preemption was neither argued nor decided.

In *Image Carrier Corp. v. Beame,* 567 F.2d 1197 (2nd Cir. 1977), *cert. denied,* 440 U.S. 979 (1979), the Second Circuit dealt only with the issue of whether the city ordinance coerced employees to join unions or altered the collective bargaining relationships of non-union shops. It did not reach the issue of whether Congress intended to preempt local practices which alter collective bargaining relationships.

Finally, *Amalgamated Transit Union v. Byrne,* 568 F.2d 1025 (3d Cir. 1977) (*en banc*) dealt with the issue of whether the state could withdraw state subsidies to transit companies that agreed to uncapped cost of living clauses. As the Third Circuit noted, New Jersey's interest, as a primary source of operational funding, was in providing essential local transportation services to the public, *not* in regulating labor relations *per se.* Here, Wisconsin's purpose is undisputedly that of regulating labor conduct.

4. Although the Seventh Circuit disagreed with the district court's finding that the blacklist statutes unlawfully interfered with an employer's rights to judicial review of NLRB decisions (App. 76-77), appellee does not abandon that contention which sustains the Seventh Circuit's judgment.

Wisconsin's statutes unlawfully deter employers from seeking judicial review of NLRB decisions, thereby interfering with the development of national labor policy. Substantive national labor policy evolves on a case-by-case basis subject to judicial review. *NLRB v. Weingarten, Inc.,* 420 U.S. 251, 265 (1975). *See also, NLRB v. Wyman-Gordon Co.,* 394 U.S. 759 (1969). Thus, Congress determined that the courts of appeals have superior authority to properly interpret the Act. *NLRB v. Brown,* 380 U.S. 278, 290-292 (1965).

Under Wisconsin's statutes, an employer may commit any number of unfair labor practices without risk of debarment. If the employer acquiesces in the Board's finding of unfair labor practices, it will not be debarred. *Only* if judicial review is

sought is the threat of debarment made. If the employer loses three appeals, no matter how *bona fide* they may have been, and even if the Board is affirmed only in part, the employer is blacklisted. *See e.g., Gould Inc.*, 216 NLRB 183 (1975) *enf'd in part, den. in part,* 77 CCH Lab. Cases § 11,953 (6th Cir. 1976).

Judicial review of Board unfair labor practice decisions is an integral part of the statutory scheme. For example, under the NLRA, the only way an employer can obtain judicial review of a Board bargaining unit determination is to refuse to bargain with the union, an unfair labor practice under § 8 of the Act which permits judicial review. That is precisely what happened in *Gould Inc.*, 237 NLRB 66 (1978), *enf'd*, 610 F.2d 316 (5th Cir. 1980).

Likewise, Board precedent sometimes so lacks stability, in the absence of judicial review, that an employer who, in good faith, challenges a Board decision cannot properly be denigrated as a "recidivist" as claimed by the Jurisdictional Statement. Thus, in *Gould Inc.*, 238 NLRB 618 (1978), *enf'd*, 638 F.2d 159 (10th Cir. 1980), the Board found that a Gould division committed an unfair labor practice by discharging two sympathy strikers. An arbitrator found that the no-strike clause included sympathy strikes. The Board ignored that ruling and held the discharges illegal. The NLRB now holds such discharges lawful. *Indianapolis Power & Light Co.*, 273 NLRB No. 211 (January 31, 1985).

Accordingly, appellee prays that the Seventh Circuit judgment be affirmed. All four judges below were not wrong—they simply followed this court's rulings. This court's time and energy should not be wasted in restating those rulings.

Respectfully submitted,

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